

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ROBERT C. JARVIS and RETHA D. JARVIS,
Husband and Wife,

Case No. 3:16-CV-05194-RBL

Plaintiffs,

vs.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION, a federal corporation; THE
BANK OF NEW YORK MELLON, F.K.A. THE
BANK OF NEW YORK, AS TRUSTEE FOR
CWHEW, INC., HOME EQUITY LOAN ASSET
BACKED CERTIFICATES, SERIES 2006-s10;
and MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., Delaware
corporation

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

**NOTE ON MOTION CALENDAR:
JANUARY 27, 2017**

Defendants.

Plaintiffs ROBERT C. JARVIS and RETHA D. JARVIS, Husband and Wife, respectfully
submit the following reply in support of their motion for summary judgment.

I. REPLY

Defendant FEDERAL NATIONAL MORTGAGE ASSOCIATION ("Fannie Mae") argues
that *Edmundson v. Bank of America*, 194 Wn. App. 920, 378 P.3d 272 (2016) and *Silvers v. U.S.
Bank*, No. 15-5480 RLB, 2015 WL 5024173 (W.D. Wash. August 24, 2015) are dicta and should not
be relied on by the Court. That is incorrect. A statement is dicta when it is not necessary to the
court's decision in a case. *Ruse v. Dep't of Labor & Indus.*, 138 Wash.2d 1, 8-9, 977 P.2d 570 (1999).

1 In *Edmundson v. Bank of America*, 194 Wn. App. 920, 378 P.3d 272 (2016), Plaintiffs did not
 2 make the November 1, 2008, monthly installment payment on a note and deed of trust or any
 3 payments thereafter. *Id.* at 923. They filed Chapter 13 Bankruptcy in June 2009 and received a
 4 discharge on December 31, 2013. *Id.* In March 2015 Plaintiffs sought to enjoin a scheduled trustee's
 5 sale of the property under the deed of trust, arguing *inter alia* that the six year statute of limitations
 6 had run on November 1, 2014, six years after their initial default. *Id.* at 924. In order to decide
 7 whether the statute of limitations had run, it was necessary for the court to decide when the statute of
 8 limitations accrues on a secured installment note in default when the installment payment obligations
 9 have been discharged. In making this determination, the court stated:

10 Here, the statute of limitations accrued for each installment from the time it became
 11 due. Thus, the statute accrued on November 1, 2008 for that missed payment only.
 November 1, 2014 was six years later.

12 Correspondingly, the statute of limitations for each subsequent monthly payment
 13 accrued on the first day of each month after November 1, 2008 until the Edmundsons
 14 no longer had personal liability under the note. They no longer had such liability as of
 15 the date of their bankruptcy discharge, December 31, 2013. Thus, from December 1,
 2008 through December 1, 2013, the statute of limitations accrued for each monthly
 payment under the terms of the note as each payment became due.

16 *Id.* at 931.

17 In *Silvers v. U.S. Bank*, No. 15-5480 RLB, 2015 WL 5024173 *1 (W.D. Wash. August 24,
 18 2015), Plaintiffs made no monthly installment payments on a note secured by a deed of trust after
 19 August 29, 2008, and received a Chapter 7 discharge on January 25, 2010. Petitioners' received a
 20 Notice of Default and Intent to Foreclose on March 26, 2015. The issue for the court was whether the
 21 statute of limitations had run on the lender's right to foreclose the deed of trust. Just as in
 22 *Edmundson*, in order to decide whether the statute of limitations had run, it was necessary for the
 23 court to decide when the statute of limitations accrues on a secured installment note that is in default
 24

1 when the installment payment obligations have been discharged. *Id.* at *1. In making this
 2 determination, the court concluded:

3 The statute of limitations on the right to enforce the Deed of Trust began running the
 4 last time any payment on the Note was due. The Plaintiffs remained personally liable
 5 on the Note (and successive payments continued to be due) until January 1, 2010,
 6 when they missed that payment; they received a discharge on January 25, 2010.
 7 Accordingly, the statute of limitations to enforce the Deed of Trust lien began to run
 8 on January 1, 2010.

9 *Silvers*, 2015 WL 5024173, at *4.¹ Since the determinations in *Edmundson* and *Silver* were both
 10 necessary to the respective courts' decision, they are not dicta.

11 Both of these decisions are based on established law that "when recovery is sought on an
 12 obligation payable by installments[,] the statute of limitations runs against each installment from the
 13 time it becomes due; that is, from the time when an action might be brought to recover it." *Herzog v.*
 14 *Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142, 144–45 (1945); *In re Parentage of Fairbanks*, 142 Wn.
 15 App. 950, 960, 176 P.3d 611 (2008); see also 25 David K. Dewolf, Keller W. Allen & Darlene
 16 Barrier Caruso, *Washington Practice: Contract Law and Practice* § 16:21 (3d ed.)(October 2016
 17 Update) ("Where a contract calls for payment of an obligation by installments, the statute of
 18 limitations begins to run for each installment at the time such payment is due"). Although Fannie
 19 Mae is correct that the discharge does not remove or discharge *in rem* liability of property for debts,
 20 such as the *in rem* liability of a deed of trust, *In re Akram*, B.R. 371, 375 (2001)(Bankr. CD Cal.
 21 2001), a discharge does not convert a strictly personal liability, such as a promissory note, into an *in*
 22 *rem* liability. None of the cases cited by Fannie Mae stand for the proposition that a promissory note

23 ¹ Contrary to Fannie Mae's assertion, the lender in *Silver* briefed the issues, and argued that the statute
 24 of limitations began to run when the last installment payment was due (January 1, 2010) prior to the Plaintiff's
 discharge, and would expire six years later (January 1, 2016). Declaration of Amann Exhibit A page 5;
 Exhibit B page 3.

1 passes through bankruptcy unaffected. Rather it is the deed of trust that creates the security interest
 2 in the debtor's property and the *in rem* liability. Thus, it is the lien of the deed of trust for the
 3 debt and the right to foreclose on the deed of trust that survives bankruptcy, not the right to continue
 4 to receive monthly installment payments. *See Johnson v. Home Street Bank*, 501 U.S. 78, 82 111
 5 S.Ct. 2150 (1991). Also, it is the promissory note that creates the personal obligation of the debtor to
 6 make installment payments, not the deed of trust. Fannie Mae cites no authority for the specific
 7 proposition that the right to receive monthly installment payments survives bankruptcy *in rem*.

8 Fannie Mae also argues that following the decisions of Edmonson and Silver would lead to a
 9 parade of horrors by ending the "ride-through" option while providing Plaintiffs a windfall. This
 10 concern is unfounded. First debtors may still voluntarily keep installment payments current and
 11 otherwise voluntarily comply with the terms of the applicable loan documents to avoid foreclosure. In
 12 re Parker, 39 F.3d 668, 672 (1998) The issue of when the statute of limitations would run on "ride-
 13 through" where no default has occurred and the debtor continues to voluntarily comply with the terms
 14 of the note and deed of trust is not before the court in this case and was not before the courts in *Silver*
 15 or *Edmundson*. This case, *Silver* and *Edmundson*, all involve situations where the default had
 16 occurred prior to discharge and no subsequent payments were made. Second, Plaintiffs are not
 17 seeking a windfall. In fact, they attempted to deed the property back to the creditor and have wanted
 18 the opportunity to begin rebuilding their credit, which is not possible with the house still in their
 19 name and the specter of foreclosure still hanging over them, and cease receiving letters from loan
 20 servicing agencies.² It may well take seven years after a foreclosure before a debtor to qualify for a
 21 home loan.³ Under Fannie Mae's theory, a creditor could delay foreclosure for thirty years,

23 _____
 24 ² Supplemental Jarvis Dec.

³ See <http://www.nolo.com/legal-encyclopedia/when-can-i-get-mortgage-after-foreclosure.html>

effectively preventing a debtor from ever being able to purchase another house. In cases where the debtor has defaulted prior to bankruptcy and no payments have been made after bankruptcy, the six year statute of limitations strikes the appropriate balance between the creditor's right to foreclose on its collateral, the aim of the Bankruptcy Code to give an honest but unfortunate debtor a fresh start, and the goal of statutes of limitations "to eliminate the fears and burdens of threatened litigation and to protect the defendant against stale claims."

If the debtor has stopped making payments and obtained a Chapter 7 discharge, there simply is no good reason why a creditor/deed of trust holder needs more than six years to commence foreclosure proceedings.

II. Conclusion

For the reasons set forth above, and in Plaintiffs' motion, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment, ordering (1) that Plaintiffs owns, in fee simple absolute, the Jarvis Property as against the Defendant Fannie Mae and all persons claiming under the Defendant, who shall have no estate, right, title, lien or interest in or to the Jarvis Property, or any part thereof, (2) that title to the Jarvis Property be quieted to the Plaintiffs against all claims of Defendant and all persons claiming under Defendants; and (3) that the Deed of Trust be extinguished.

Dated this _____ day of January, 2017

VSI Law Group, PLLC

By: /s/Gregory F. Amann

Gregory F. Amann, WSBA No. 24172

225 Tacoma Avenue South
Tacoma, WA 98402
253-922-5464
gfa@vsilawgroup.com

CERTIFICATE OF SERVICE

I certify on the date indicated below I caused a copy of the foregoing document to be filed with the clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send email notification of such filing to the attorneys of record.

I affirm under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct to the best of my knowledge.

SIGNED January 27th, 2017, at Tacoma, Washington.

By: /s/ Gregory F. Amann
Gregory F. Amann, WSBA No. 24172
gfa@vsilawgroup.com

225 Tacoma Avenue South
Tacoma, WA 98402
T: 253-922-5464
F: 253-212-3963

Attorneys for Plaintiffs, Robert C. Jarvis
and Retha D. Jarvis